89-734

No.:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TEDDY RAY BOHANON, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI STATE OF CALIFORNIA COURT OF APPEALS FIRST APPELLATE DISTRICT

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TEDDY RAY BOHANON

QUESTIONS PRESENTED

1. Whether the rule of United States v. Ross should be applied to a warrantless search of an automobile where the existence of the automobile was known but omitted from the search warrant and the officer testified that he had no independent probable cause to search the vehicle upon requesting the search warrant.

PARTIES TO THE PROCEEDINGS

Teddy Ray Bohanon was the party in the proceeding.

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PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI
STATE OF CALIFORNIA COURT OF APPEALS
FIRST APPELLATE DISTRICT

TO: THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST DISTRICT

The petitioner, TEDDY RAY BOHANON, respectfully prays that a writ of certiorari issue to review the judgment of the California State Court of Appeals entered on May 26, 1989.

OPINION BELOW

On May 26, 1989, the California

State Court of Appeals for the First Appellate District entered its memorandum affirming the conviction of petitioner for possession of cocaine for sale, in violation of California State Health and Safety Code § 11351. A copy of the memorandum, which is not to be published, is attached hereto as Appendix A.

JURISDICTION

On May 26, 1989, the Court of Appeals entered judgment affirming the conviction of petitioner for possession of cocaine for sale, in violation of California State Health and Safety Code § 11351. Petitioner filed a petition for hearing before the California State Supreme Court on June 29, 1989, a petition which was denied by the Court without comment on August 9, 1989. A

copy of the order denying review by the Supreme Court of California is attached hereto as Appendix B. Jurisdiction of this Court is invoked under Title 28, United States Code § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment Four:

> "The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable search and seizure."

STATEMENT OF THE CASE

The charges against petitioner, were the result of a warrantless search of one of petitioner's cars not listed in a search warrant obtained by California State authorities.

Based on a six page search warrant affidavit, Agent Mulligan obtained a search warrant which ordered the search of "the premises, structures, rooms, receptacles, and safes situated at 249 Inverness Court, Oakland." [CT: 34-37].[1] The search warrant also authorized the search of the person Teddy Ray Bohanon. However, the authorization to search any cars was left blank. The attached affidavit acknowledges that Teddy Ray Bohanon owns eight (8) vehicles; four (4) trucks, a 1980 Pontiac, a 1973 Mercury, a 1976 Mercedes Benz, and a 1984 Porsche. Agent Mulligan ran DMV checks on all the cars and knew they belonged to Mr. Bohanon. During further surveillance of the house, Mulligan observed a 1980 Pontiac on at least two or three

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[1] Clerk's Transcript (CT)

occasions parked near the residence. [CT: 108].

On March 7, 1987, at approximately 7:00 a.m., Mulligan and several Department of Justice agents and Oakland Police officers served the search warrant on 249 Inverness Court. [CT: 38]. After the knock and announce with no response, the officers served the warrant on the petitioner and a search of the house ensued.

A three and one-half hour search revealed $20,000 in cash, gold jewelry, miscellaneous paraphernalia, and a small bindle of cocaine found in the headboard of the bed. [CT: 44, 52].

Although the search warrant did not specify any vehicles to be searched, Mulligan searched a Cadillac and a truck. [CT: 104]. The search of these vehicles,

although unauthorized, uncovered nothing of a criminal nature. Following the extensive search, appellant and Tina Griffin, his companion, were placed under arrest for possession of one small bindle of cocaine seized from the bedroom. [CT: 54]. Petitioner was then placed in Mulligan's vehicle for transportation. [CT: 66]. While in the vehicle, another agent asked Mulligan after he completed the search of the Cadillac and truck if he had searched the 1980 Pontiac parked in front of 249 Inverness Court. A spontaneous response from petitioner that the Pontiac did not belong to him followed the question. [CT: 70-71]. Mulligan was aware that the vehicle was registered to petitioner. [CT: 70].

Mulligan reentered the house and

retrieved a set of keys in petitioner's bedroom. [CT: 76]. He used the keys to gain entry to the Pontiac. [CT: 76]. After a search of the passenger compartment revealed nothing, Mulligan opened the trunk and discovered an eel skin attache' case. [CT: 77]. Mulligan opened the closed attache' case and inside was a closed paper bag which he opened. Inside the bag he discovered a plastic bag containing cocaine. [CT: 78, 79]. During the preliminary hearing Mulligan testified that he had no prior knowledge that cocaine was being stored or carried in any of petitioner's vehicles. [CT: 110]. Agent Mulligan also testified that once petitioner had made his statement concerning ownership of the car: "It occurred to me that would be a very good location for a

stash." [CT: 115, lines 5 - 8]. Mulligan indicated that during his initial investigation of Mr. Bohanon, he had no information from any confidential informant that Mr. Bohanon used his cars to transport cocaine, he did not have any information from police sources that Mr. Bohanon was known to stash cocaine in the trunks of his personal vehicles, nor did he have any reason to believe that prior to March 7, 1985, Mr. Bohanon commonly stored narcotics in his car trunk. [CT: 83-84].

Based upon this evidence, the magistrate denied petitioner's motion to suppress the evidence and held petitioner to answer.

On September 28, 1987, Petitioner moved in Alameda County Superior Court to suppress the illegally seized evidence

under Penal Code § 1538.5. The motion was denied by the Honorable Jacqueline Taber, Judge Presiding.

Petitioner, on November 10, 1987, subsequently pled guilty to one count of 11351 Health and Safety Code and January 19, 1988, and was sentenced to two years in state prison.

REASONS FOR GRANTING THE WRIT

THE RULE OF UNITED STATES v. ROSS SHOULD NOT APPLY TO THE WARRANTLESS SEARCH OF PETITIONER'S AUTO WHERE THE EXISTENCE OF THE AUTO WAS KNOWN BUT OMITTED FROM THE SEARCH WARRANT.

This Court in United States v. Ross 456 U.S. 798 (1982), reaffirmed the automobile exception to the warrant requirement first enunciated in Carroll v. United States 67 U.S. 132 (1925),

wherein it was established that "a search [of a motor vehicle] is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." Ross, 456 U.S. at 809. Ross extended this exception to not only the interior of the motor vehicle, but to any closed containers also contained in the motor vehicle. Id.

But this Court has repeatedly held under Fourth Amendment grounds that probable cause must exist justifying a search warrant and that this probable cause be determined by a "neutral and detached magistrate instead of...the officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States 333 U.S. 10, 14 (1948). "Searches conducted outside the

judicial process, without prior approval by judge or magistrate, are per se unreasonable." Katz v. United States 389 U.S. 347, 357 (1967).

This Court has allowed exceptions to the search warrant requirement "where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence outweigh the reasons for prior recourse to a neutral magistrate." Arkansas v. Sanders 442 U.S. 753, 759 (1979). The exception to the search warrant requirement for automobiles is based upon the rationale of the diminished privacy interests of the individual in the interior of the automobile and the inherent mobility of automobiles. Ross, 456 U.S. at 806-807; Carroll, 267 U.S. at 153-156.

The instant case presents a situation wherein the societal costs of obtaining a warrant outweigh the excuse of a warrantless search of the automobile as authorized in Ross. The investigating officer for the State indicated that after he had discussions with two confidential informants, he conducted an independent investigation wherein he discovered that petitioner owned eight cars. Further, the officer conducted several visual surveillances of petitioner's home and noted the subject vehicle parked in front of petitioner's home on several occasions. The officer, armed with the fruits of his investigation, then applied to a magistrate for authorization to search petitioner's home. But, even though the officer knew that petitioner owned the

subject vehicle and knew that petitioner parked the vehicle in front of the home and knew that petitioner had parked the vehicle in front of the home on the day the search warrant was executed, failed to include the subject vehicle in the affidavit supporting the search warrant or the search warrant itself.

This situation is one that has not been dealt with by this court, and is not answered by Ross. The officer had ample time to obtain a search warrant with full knowledge of the subject vehicle but failed to include it in the search warrant. After the warrant was executed, the officer had full control of the subject vehicle as all occupants of the home were in custody and the keys to the car were in the possession of the officer. This situation does not have

the inherent problem of a limited time factor to obtain a warrant which was a factor considered by this Court in Carroll and Ross. Petitioner argues that the application of Ross to this scenario is an extension of Ross not contemplated by this Court and its continued insistence on the use of search warrants. To put it simply, this fact situation simply does not fit into the automobile exception enumerated in Ross and Carroll.

CONCLUSION

To permit the application of Ross to the search of petitioner's automobile, would be a further erosion of the basic rights protected by the Fourth Amendment and is contrary to this Court's holding in Ross. For the foregoing reasons, petitioner respectfully submits that the

PROOF OF SERVICE

I am a citizen of the United States, I am over the age of eighteen years and not a party to the within action; my business address is: 1401 Lakeside Drive, Suite 700, Oakland, California 94612.

On 10-5-89, I served the within:

PETITION FOR WRIT OF CERTIORARI

on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California, addressed as follows:

Clerk of the Superior Court
County of Alameda
1225 Fallon Street
Oakland, California 94612

John J. Meehan
District Attorney
For the County of Alameda
1225 Fallon Street
Oakland, California 94612

Clerk of the Court
Court of Appeal
First Appellate District
455 Golden Gate Avenue
San Francisco, California 94102
The Honorable John Van De Kamp
Attorney General of California
6000 State Building
San Francisco, California 94102

I, REBECCA N. PATAGUE, declare under penalty of perjury that the foregoing is true and correct and was executed on 10-5-89, at Oakland, California.

Rebecca N. Patague
REBECCA N. PATAGUE

John J. Meehan
District Attorney
For the County of Alameda
1225 Fallon Street
Oakland, California 94612

Clerk of the Court
Court of Appeal
First Appellate District
455 Golden Gate Avenue
San Francisco, California 94102
The Honorable John Van De Kamp
Attorney General of California
6000 State Building
San Francisco, California 94102

I, REBECCA N. PATAGUE, declare under penalty of perjury that the foregoing is true and correct and was executed on 10-5-89, at Oakland, California.

Rebecca N. Patague
REBECCA N. PATAGUE

PROOF OF SERVICE HAND DELIVERY

I am a citizen of the United States, I am over the age of eighteen years and not a party to the within action; my business address is: 1401 Lakeside Drive, Suite 700, Oakland, California 94612.

On 10-5-89, I served the within:

PETITION FOR WRIT OF CERTIORARI

on the interested parties in said action by delivering in person a true copy thereof addressed as follows:

TEDDY RAY BOHANON
1401 Lakeside Drive, Suite 700
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct and was executed on 10-5-89, at Oakland, California.

Rebecca N. Patague
REBECCA N. PATAGUE

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

Filed May 26, 1989
Court of Appeal
First Dist.
By: RON D. BARROW,
Clerk

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent, A041507

v.

TEDDY RAY BOHANON, Alameda County Superior Court

Defendant and Appellant. No. 87736

Teddy Ray Bohanon appeals his conviction by plea nolo contendre to possession of cocaine for sale. (Health & Saf. Code, § 11351.)[1] He contends the court erred in denying his motion to suppress evidence. (Pen. Code, §

[1] Unless otherwise indicated, all further statutory references are to the Health and Safety Code.

1538.5.) We affirm.

FACTS

In February 1985 Department of Justice Narcotics Detail Agent Paul Mulligan prepared an affidavit in support of a search warrant for appellant's residence and his person. The affidavit indicated that Mulligan conducted a Department of Motor Vehicles check on eight vehicles owned by appellant, including a 1980 Pontiac. A search warrant issued authorizing a search of appellant's Oakland residence and his person.[2] The warrant specifically authorized a search for cocaine, cocaine processing paraphernalia, documents reflecting cocaine sales, and keys to the

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[2] The record on appeal contains neither the affidavit nor the search warrant, and appellant does not challenge the warrant for his residence or person.

residence.

On March 7, 1985, Mulligan, three other Department of Justice agents and five Oakland police officers went to appellant's residence to execute the search warrant. After knocking and receiving no response, they forced the door open. Appellant was found inside, served with the warrant, and the police began a search of the house. The search of the house turned up $20,000 in cash, gold jewelry, cocaine processing paraphernalia, a yellow bindle later found to contain cocaine, notebooks that in Mulligan's opinion recorded narcotics sales, and several firearms. Appellant was arrested for possession of cocaine. A Cadillac automobile and a truck owned by appellant were searched, but no contraband was discovered.

Appellant was placed in the back of Mulligan's vehicle for transport to jail. After Mulligan left appellant's residence, he got into the car with appellant and Agent Platt. Platt pointed to the Pontiac parked 30 feet away from the house and asked Mulligan if anyone had searched it. Appellant then spontaneously stated, "I don't know anything about that car, it's not mine." He denied having keys to the Pontiac and again said it was not his and that he knew nothing about it. Mulligan knew that the Pontiac was registered to appellant, and during prior surveillance had seen it parked in front of appellant's house. He suspected that the Pontiac contained contraband, based on appellant's denial of ownership and knowledge of the car, that only a small

bindle of cocaine was found in the residence, and that the paraphernalia, cash, sales records and information from an informant indicated that appellant was a major dealer. Mulligan was also concerned that a person whom appellant had called to secure his residence might remove contraband from the car. Prior to appellant's spontaneous statement, Mulligan had no specific information from other officers or informants that appellant had contraband in his vehicles.

Mulligan found the keys to the Pontiac in appellant's bedroom and searched the passenger compartment and the trunk. Inside the trunk he found an eelskin attache case which felt like it contained something. Mulligan believed that it might contain cocaine. Upon unzipping and opening the attache case,

Mulligan found an open brown paper bag containing approximately a kilogram of cocaine, together with receipts bearing appellant's name.

The magistrate ruled that Mulligan had probable cause to search the Pontiac, and that the search of the car and the attache case was valid. In denying the motion to suppress, the trial court stated: "I think there was just ample probable cause and by the time they found all the indication that this man did indeed deal, cocaine, money, I think there was some paraphernalia, . . . and nothing in the house and not in the other two cars, the remaining car was probably the most suspect." Although the court concluded that appellant's vehicles should have been included in the search warrant, it found that Agent Mulligan

was not trying to circumvent the magistrate in failing to request a warrant for search of the vehicles.

DISCUSSION

Appellant contends there was no probable cause to justify a warrantless search of the Pontiac and the attache case found in the trunk. He also contends that his statement denying ownership and knowledge of the Pontiac could not support a determination of probable cause, since the statement was obtained in violation of Miranda v. Arizona (1966) 384 U.S. 436.

Appellant's Statement to Police

Over appellant's objection that his statement to the police denying ownership of the Pontiac was inadmissible hearsay, the magistrate ruled it admissible as an

admission. Respondent contends that since appellant failed to specifically object to the statement below on the grounds of a violation of Miranda, he is precluded from doing so on appeal. It is the general rule that failure to object at trial to the admission of statements obtained in violation of Miranda cannot be raised for the first time on appeal. (People v. Peters (1972) 23 Cal.App.3d 522, 530; 3 Witkin, Cal. Evidence (3d ed. 1986) Introduction of Evidence at Trial, §§ 2012, 2013, pp. 1971-1974; see Evid. Code, § 353.) The trial court properly ruled the statement an admission (Evid. Code, § 1220) and appellant's failure to properly object on Miranda grounds constitutes a waiver.

Assuming arguendo that appellant may object to the admission of the statement

on appeal, we conclude that the statement was voluntary and not obtained in violation of Miranda. The procedural safeguards outlined in Miranda are only required when a suspect in custody is subject to interrogation. (Rhode Island v. Innis (1980) 446 U.S. 291, 300.) "'[I]nterrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (Id., at p. 301 fns. omitted.) Appellant's statement was made while in custody, but was completely spontaneous and not in response to any express question by police. Moreover, the record does not reflect that Officer

Platt should have known his question to Mulligan was likely to elicit an incriminating response from appellant.

Warrantless Search of the Pontiac

In determining whether the warrantless search of appellant's car was proper, we consider the applicability of the automobile exception to the Fourth Amendment warrant requirement.

Carroll v. United States (1925) 267 U.S. 132 established that "a search [of a motor vehicle] is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." (United States v. Ross (1982) 456 U.S. 798, 809, fn. omitted.) The automobile exception applies equally to vehicles the police stop on the highway and to those

they find parked at the curb. (People v. Dumas (1973) 9 Cal.3d 871, 883; People v. Superior Court (Overland) (1988) 203 Cal.App.3d 1114, 1119.) Moreover, a warrantless auto search does not require any additional "exigent circumstances." (United States v. Johns (1985) 469 U.S. 478, 484; Michigan v. Thomas (1982) 458 U.S. 259, 262; People v. Superior Court (Overland), supra, at p. 1120.) The dispositive inquiry in reviewing a motion to suppress evidence obtained in a auto search is whether the objective facts demonstrate that the officers had probable cause to believe that the vehicle contained contraband. (United States v. Ross, supra, at pp. 807-808; California v. Carney (1985) 471 U.S. 386, 394-395; People v. Carvajal (1988) 202 Cal.App.3d 487, 497; People v. Superior

Court (Overland), supra, at p. 1119.)

"[P]robable cause for a search exists where an officer is aware of facts that would lead a man of ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched. [Citations.]" (Wimberly v. Superior Court (1976) 16 Cal.3d 557, 564.) On appeal we uphold the express or implied findings of fact by the trial court which are supported by substantial evidence. (People v. Leyba (1981) 29 Cal.3d 591, 596-597.) Since the issue of the reasonableness of the search or seizure is a question of law, we exercise our independent judgment to determine whether the facts as found support the trial court's legal conclusion. (Id., at

p. 597; People v. Lawler (1973) 9 Cal.3d 156, 160; People v. Long (1987) 189 Cal.App.3d 77, 82-83.)

We conclude the trial court correctly determined that Mulligan had probable cause to search the Pontiac. Mulligan had been informed that appellant was a major cocaine dealer, and the search of appellant's residence turned up ample evidence of cocaine processing and sales. However, only a very small amount of cocaine was found in the residence. Based on his experience in narcotics investigation, Mulligan could reasonably believe that the contraband was located elsewhere. Appellant's denial of ownership of the Pontiac which Mulligan knew was registered in appellant's name could reasonably lead Mulligan to believe the Pontiac contained contraband.

Finding the keys to the Pontiac in appellant's house provided further confirmation. Since the totality of these factors sufficiently establishes probable cause to justify issuance of a search warrant to search the Pontiac, the search was reasonable.

Appellant contends that even if the warrantless search of the Pontiac was proper, the search of the closed attache case found in the trunk was improper. We disagree. "If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of ever part of the vehicle and its contents that may conceal the object of the search." (United States v. Ross, supra, 456 U.S. at p. 825; accord, People v. Carvajal, supra, 202 Cal.App.3d at p. 498 [search of sealed boxes found in pickup truck,

upheld]; United States v. Nicholson (1989) 207 Cal.App.3d 707, 712 [search of briefcase found on floor behind driver's seat, upheld]; United States v. Vasquez (9th Cir. 1988) 858 F.2d 1387, 1391 [search of unsealed envelope found in unlocked briefcase inside car, upheld].) Based on the facts before us, we conclude that Agent Mulligan had probable cause to believe that cocaine could have been concealed inside the attache case, thereby justifying its search.

Affirmed.

HANING, J.

We concur:

LOW, P.J.

KING, J.

A041507
People v. Bohanon

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION FIVE, No. A041507

S010882

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

THE PEOPLE,

Respondent,

v.

TEDDY RAY BOHANON,

Appellant.

Supreme Court
FILED
August 9, 1989
Robert Wandruff,
Clerk

Appellant's petition for review DENIED.

/s/
EAGLESON,
Acting Chief Justice